Supreme Court, U.S.
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IN THE

Supreme Court of the United States

No. 78-1542

AUTOMOBILE CLUB OF MICHIGAN, DETROIT AUTOMOBILE INTERINSURANCE EXCHANGE, MOTOR LAND INSURANCE AND GROUP INSURANCE COMPANY OF MICHIGAN,

Petitioners

VS.

DOROTHY J. BELL, SHIRLEY J. SIMS, KATEY WEATHERSPOON, MARTHA COWAN, ANITA PRYSOCK, LILLIE YARBOROUGH, DAVID ADAMS, CHARLES HALL, DWIGHT T. SMITH, JOHNNIE GREEN, JAMES CASTELLE AND HENRY SWIFT, individually and on behalf of all persons similarly situated,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

OPINIONS BELOW

On August 10, 1978, the District Court of the Eastern District of Michigan entered an order granting respond-

ents' discovery request for petitioners to answer interrogatories or permit access to the petitioning employers' premises for purposes of administering a professionally developed questionnaire to petitioners' employees. The verbal findings of the District Court were announced at the hearing and thereafter an order was entered. The order of the District Court is reported unofficially at 18 FEP Cases 970.[1]

The Court of Appeals for the Sixth Circuit by order dated March 12, 1979, dismissed the petitioners' appeal as an interlocutory discovery order, observed that petitioners could avoid any potential harm by refusing to obey the order and seeking review after sanctions are applied, and refused to issue the requested writ of mandamus since petitioners had failed to show the existence of exceptional circumstances. Both the District Court's and the Court of Appeal's orders are reprinted in the appendix to the petition at pp 1a-3a and 4a-5a.[2]

JURISDICTION

The petitioner's invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) or alternatively under 28 U.S.C. § 1651(a).

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Sixth Circuit act properly in dismissing the petitioners' extraordinary method for seeking review of a discovery order, particularly when the ordered discovery is still subject to further

[1] The District Court on January 9, 1979, refused to certify its order under 28 U.S.C. § 1292(b) or to stay the taking of the survey pending appeal.

[2] The Court of Appeals denied petitioners' request for a stay pending appeal. Thereafter the District Court denied the petitioners' request for a stay pending the resolution of the instant petition as did Justice Stewart on April 10, 1979.

modifications by the District Court and when the attempted appeal predates the imposition of sanctions by the Court.

2. Whether the District Court acted within its authority in ordering an on-premises employee survey.

STATUTES AND RULES INVOLVED

The statutes involved are §§ 28 U.S.C. 1254(1), 1291, and 1651. The Federal Rules involved are Rules 26b(1), 26(c), 33 and 34 of the Federal Rules of Civil Procedure. The pertinent text of these statutory provisions and rules are contained in the Appendix at pp 1a-2a. See also petition appendix pp 6a-9a.

STATEMENT OF THE CASE

This case involves a certified class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-*et seq.* as amended and Section One of the Civil Rights Act of 1966, as amended, 28 U.S.C. § 1981. The complaint as amended alleges that petitioner ("AAA") has engaged in and is engaging in a broad pattern of racial discrimination in violation of Title VII and § 1981. Among other things, the complaint alleges that the move of AAA's corporate headquarters from downtown Detroit to a suburban location in Dearborn, Michigan, would have an unlawful discriminatory impact upon blacks.[3]

The continuing adverse impacts alleged in the complaint include, *inter alia*, the following:

[3] Petitioners announced to their employees the decision to relocate their headquarters employing approximately 1,200 persons to the Dearborn site, on or about February 1, 1971. The relocation occurred in April and May of 1974.

1) Blacks would not be able to continue their employment with AAA at the new location to the same extent as white employees.

2) The relocation would impose greater travel or other economic burdens upon black employees than white employees.

3) The new location would place potential black employees at a competitive disadvantage to potential white employees.

In order to flush out the extent of these differing alleged impacts, respondents under the supervision of John Kain, Chairman of the Department of City and Regional Planning, Harvard University, Cambridge, Massachusetts, and Susan Smock, Professor of Urban Planning and Co-administrator of Research, Wayne State University, Wayne State Center for Urban Studies, Detroit, Michigan developed an employee questionnaire. As detailed in the materials considered by the District Court, the survey (questionnaire) requires written answers, seeks objective rather than attitudinal responses and does not entail employee interviews.[4]

The employee information requested in the survey falls generally into the following categories:

1) data pertaining to employee transportation—primarily the employee's mode(s) of travel to and from work, and verification of addresses information; and

2) data pertaining to the employee household.

As reflected in the record, a major reason for the transportation information requested in the survey is to enable respondents to identify the differing effects of the relocation by ascribing appropriate employee travel times and changes in those times or to identify differing cost im-

[4] The survey appears as an attachment to the petition pp. 10a-11a.

pacts associated with the relocation such as the necessity for employee class members previously dependent upon public bus transportation to purchase cars. The household and background information is requested to enable respondents' experts to describe and address through appropriate multi-variate analysis the extent to which the alleged adverse transportation burdens imposed on class-members may be attributed to AAA's relocation.[5]

After considering briefs, oral arguments, affidavits of respondents' experts and management representatives of petitioners and hearing trial testimony of petitioners' experts, the District Court announced its findings and thereafter entered an order. The District Court's order included in pertinent part the following findings and procedures:

1. The information sought by plaintiffs may be relevant to the relocation issue in this case. The Court finds the survey procedures requested by plaintiffs to be the most reasonable method of proceeding to gather this information and to be preferable to the burdens associated with an effort of trying to literally and individually interrogate each person under oath by deposition.

* * * *

2. Defendants shall arrange to have employees present at a reasonable time during their working hours for the purposes of responding to the survey and shall without cost to plaintiffs make an appropriate room available on their premises for the conducting of said survey.

* * * *

[5] The materials and briefs considered by the Court also reflect that there exists no satisfactory alternative documentary base of AAA's from which the information requested in the survey can be constructed.

7. There is to be an introduction to the survey which will read as follows:

> This survey is being administered at the request of the United States District Court for the purposes of helping the Court understand more about the employees of the Automobile Club. No one is being ordered to answer any of the questions in the survey; each of you is free to refuse to take part. However, for your information, if you do not choose to take part in this survey, it is possible that in the future you may be ordered by the Court to present yourself for a more formalized and detailed questioning session. It is the opinion of the Court that by filling out this survey, you will be doing your part in aiding the Court's search for the truth at a minimum of inconvenience to yourself.

Under other provisions of the order respondents are required to reimburse petitioners for the time spent by employees in connection with the survey, petitioners may add questions to the survey, and petitioners are not barred from conducting their own survey. In addition, the District Court indicated that it would entertain further protective orders.

Thereafter, the Court of Appeals dismissed as interlocutory the petitioners' appeal and request for a writ of mandamus.

The District Court is currently considering requests by counsel concerning procedures and protective conditions for the survey including *inter alia* modifications in the notices to the employees and the confidentiality of survey responses. As indicated by affidavits of petitioners' management, the survey can not be conducted of the 1,200 plus employees *en masse*, but instead will occur in its training room which can only accommodate a group of 50-60 employees at any one time.

REASONS FOR OPPOSING THE WRIT

THE PETITION SEEKS REVIEW OF AN INTERLOCUTORY DISCOVERY ORDER AND DOES NOT CONCERN AN APPLICATION OF THE FEDERAL RULES OF CIVIL PROCEDURE WHICH WARRANTS REVIEW

This Court should deny the instant petition in keeping with its regular practice of rejecting petitions for certiorari review of interlocutory orders. *Cobbledick* v. *United States*, 309 U.S. 323, 325-325 (1940), *Hamilton-Brown Shoe Co.* v. *Wolf Bros & Co.*, 240 U.S. 251, 258 (1916). Like virtually every other discovery order, the District Court's discovery order permitting respondents to conduct an employee survey (questionnaire), constitutes merely a step toward full disposition on the merits, and as such, can not even under a "practical construction" of finality fit within that small category of orders permitted interlocutory review under the "collateral order doctrine." *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949) and *Eisen* v. *Carlisle & Jacqueline*, 417 U.S. 155 (1974).

The District Court's order does not even meet the first of this Court's requirement for appealability. As explained in the *Eisen, supra* at 417 U.S. at 171:

> This Court held the order [in the Cohen case] appealable on two grounds. First, the District Court's finding was "tentative, informal or incomplete."

Here, various procedures, relative burdens, and terms with regard to the use of the data are not yet resolved and as such petitioner's contended potential harms are not defined. This is particularly true in regard to matters relating to the confidentiality of employee responses.[6]

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[6] Manifestly, petitioner's alleged concern for the privacy interests of its employees, in addition to being specious since employees are not even compelled to answer the questionnaire, is clearly premature.

The need for clarity, and definition of the consequences of ordered discovery, however, is an elementary theme in the long line of cases pre-conditioning appellate review of discovery orders upon the prior imposition of sanctions. *Dow Chemical* v. *Taylor*, 519 F.2d 352, 354 (6th Cir. 1975), *cert. den.* 423 U.S. 1033; *Grinnell Corp.* v. *Hackett*, 519 F.2d 595 (1st Cir. 1969), *cert. den.* 423 U.S. 1033 (1975); *Arthur Anderson Co.* v. *Finesilver I*, 546 F.2d 338 (10th Cir. 1977) *cert. den.* 429 U.S. 1096; *Xerox Corp.* v. *SCM Corp.*, 534 F.2d 1031 (2nd Cir. 1976); *American Express Warehouseman Ltd.* v. *Trans American Ins. Co.*, 380 F.2d 277 (2nd Cir. 1967); *Borden* v. *Sylk*, 410 F.2d 843-845 (3rd Cir. 1969); *Lawyers* v. *North Carolina Board of Examiners*, 588 F.2d 547 (4th Cir. 1976). Any other result encourages the undesirable and "debilitating effects on judicial administration caused by piecemeal" review. *Eisen, supra* at 171.

Nor can review of the District Court's survey order be considered "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Cohen, supra* at 546-547. The District Court's survey order was not entered in a vacuum; instead, the order represents the by-product of the District Court's assessment of the data requested in the survey, in terms of both its relative importance to plaintiff's case, and of the relative burdens associated with obtaining that information. A review of the verbal rulings of the District Court at the hearing on August 10, 1978 would leave little question that in ordering the survey the District Court considered the cogency of the requested information to the underlying cause of action as well as the burdens and inconveniences associated with the survey as well as those presented by alternative forms of discovery.[7]

[7] For example: At Tr. 77 Judge Joiner noted that under the Discovery Rules, "Rules 26-37", he was to "look at whether the particular information is relevant to the subsequent [subject] matter involved in the pending action." In addition at Tr. 78, he explained

> So I think the judgment of the Court should be directed at the question of what is proposed here. Seems to be a reasonable and even perhaps, the most reasonable method of proceeding in an effort to gather information that will provide a basis for conclusions for the assistance of the fact finder.
>
> I think the record shows that such a survey would be helpful in a case of this kind . . . that it would probably be the best way to proceed in an effort to gather information of value to the ultimate fact finders in the case.
>
> * * * *
>
> It seems to me that it's preferable to an effort to try to literally and individually interrogate each person under oath by deposition or on the stand.

Consider also the District Court's parenthetical observation in response to questions of petitioners' counsel. ". . . I want to talk to these employees about the transportation problem . . .".

Admittedly, this Court by way of mandamus review under 28 U.S.C. § 1651, has indicated a willingness in extraordinary circumstances to formulate the necessary guidelines for the construction and application of the Federal Rules of Civil Procedure. *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964). The occasions for doing so however have been few and far between. The precedent significance of the District Court's order permitting an on-premises survey which does not even compel any employee to answer any of the questions but urges cooperation in the interest of justice is readily distinguishable from the judicial administration and discovery implications of an order such as that at issue in the *Schlagenhauf, supra*, where there existed serious "untoward results" if this Court did not formulate the limits for permitting physical and mental examinations of a defendant party.

Thus, Justice Goldberg explained at p. 122: "To hold otherwise would mean that such examinations could be ordered routinely in automobile cases" and in f.n. 18 he even highlighted the magnitude of the problem by citing

statistics reflecting the massive incidence of automobile accidents and related negligence litigation. 329 U.S. 121-122. The incidence of on-premises survey orders similar to those required in this case by the District Court can not realistically be expected to occur in appreciable numbers particularly when the ground rules of the survey require the respondent employee class representatives to reimburse the petitioner for the wages of the employees for the time spent in assembling and responding to the questionnaire.

A. The Decision of the Court of Appeals for the Sixth Circuit is Not in Conflict With the Decision of the Court of Appeals for the Second Circuit

Without reference to any of the long lines of cases which require the imposition of sanctions before permitting interlocutory review of discovery matters under 28 U.S.C. § 1291, *supra* p. 6, petitioners assert that the Court of Appeals decision for the Sixth Circuit in this case is in direct conflict with the decision of the Second Circuit in *Parents Committee of Public School 19* v. *Community School Board*, 524 F.2d 1138 (2d Cir. 1975) and further erroneously represent that the decision holds that a discovery order which compelled a party to follow a procedure not authorized by the Rules is appealable under 28 U.S.C. § 1291 as a "collateral order". In point of fact, *Parents Committee*, *supra*, does not present a conflict.

The majority opinion in that case, recognized that the lower court's order requiring the testing of school children mandatorily imposed relief sought by the plaintiffs in their complaint, as such assumed the character of a mandatory injunction, and would be reviewable under 28 U.S.C. § 1292(a)(1) after remand for the purpose of taking further evidence and entering of appropriate findings of facts and conclusions of law. 524 F.2d at 1141-1142. Although the concurring opinion in *Parents Committee*, *supra*, supports appellate review under § 1291, the

concurring opinion specifically recognizes that the majority opinion based appellate jurisdiction on 28 U.S.C. § 1292(a)(1) and not on § 1291.[8] 524 F.2d at 1143.

B. The Decision of the Court of Appeals for Sixth Circuit is Not in Conflict With Decisions of the Fourth and Seventh Circuits

Contrary to the petitioner's contention, the recent decision in *Belcher* v. *Bassett Furniture Industries, Inc.*, 588 F.2d 904 (4th Cir. 1978) does not establish as a principle of law that an on-premises survey or questioning of employees is not authorized under Rule 34 of the Federal Rules of Civil Procedure. The *Belcher* decision disallowed the taking of an on-premises inspection and questioning of employees due to what the Fourth Circuit considered was an improvidently granted order, lacking both precision and care in the formulation of appropriate protective conditions. *Belcher*, *supra*, p. 911. Therefore, the Fourth Circuit held that the district court had not provided the employer with adequate protection and remanded the case for further consideration by the district court. In short, the *Belcher* decision does not create a conflict in the Circuits, is limited to the circumstances of that case and the conclusion that there had not been an adequate balancing by the district court of the relevancy and need for the information sought against the burdens associated with the survey in that case.

Unlike the claim asserted by the employer in *Belcher*, *supra*, p. 907, the administration of respondents' written

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[8] Since the granting of respondent's request for a survey is not encompassed within the injunctive relief sought in the complaint to correct the alleged unlawful racial discrimination, petitioners were not able to frame their request for appellate review to the Court of Appeals for the Sixth Circuit upon the statutory alternative provided under 28 U.S.C. § 1292(a)(1). See *Carr* v. *Monroe Mfg.*, 431 F.2d 304, 386-87 (1970) *cert. den. sub nom., Aldridge* v. *Carr*, 400 U.S. 1000 (1971).

questionnaire does not present the safety hazards of an unstructured on-site inspection and the at-random, unstructured personnel interrogation of employees while working on a complicated factory assembly line by a roaming entourage free to ask questions not previously approved by the District Court. By contrast, the ordered survey consists of a professionally developed written questionnaire approved by the District Court after having fully evaluated the competing needs of the respondents and the alleged burdens of the petitioners. In addition the District Court's order is formulated with precision and further indicates that additional protective conditions may be needed. Finally, review of the record would demonstrate that petitioners are in no position to make the claims permitted the employer in *Belcher*, *supra*, under Rule 26(c) against "annoyance, embarassment, oppression or undue expense." [9]

Sladen v. *Girltown, Inc.*, 425 F.2d 24 (7th Cir. 1970) relied upon by petitioners, also is not in conflict with the order of the Sixth Circuit in this case. While the Seventh Circuit in the *Sladen* case held Rule 35 Federal Rules of Civil Procedure and not Rule 34 gives a district court authority to order physical examinations, it also specifically ruled that under Rule 34 a district court has the authority to require production on a showing of good

[9] Review of the record would reflect that petitioners have themselves conducted similar surveys of all employees at their administrative headquarters prior to the relocation to collect employee transportation information. Similarly, petitioners until recently have requested of applicants for employment household information similar to that requested in the survey. These surveys and/or materials and their limited value to respondents were discussed in full in either briefs or affidavits submitted to the District Court.

Although not yet approved by the District Court, the actual procedure for surveying employees will undoubtedly minimize the contended disruption of the respondent insurance companies' operations with employees being scheduled for questioning in their training room described in affidavits submitted to the District Court by representatives of the petitioners' personnel office.

cause to permit the moving party to conduct tests. Sladen, *supra*, p. 25. Here, the District Court has not forced the opposing party to conduct tests; instead it has required the production and assembly of employees to permit them the option of answering written questions and leaves to the moving party, the respondent, the actual administration of the questionnaire.

C. The District Court Acted Within Its Authority Under The Federal Rules of Civil Procedure

This Court should also not review the order requiring the survey at this time since the District Court acted within its authority. Respondents request was framed as interrogatories under Rule 33 or alternatively under Rule 34 for access to the premises. The case law under Rule 33 indicates that defendants in civil rights litigation under Title VII of the Civil Rights Act of 1964 have been required to conduct surveys to obtain or gather basic information about the work force requested by plaintiffs. See *e.g.*, *Flores* v. *Local 25, IBEW*, 14 FEP Cases 494 (E.D.N.Y. 1976). CF: *Burns* v. *Thiokol Chemical Corporation*, 483 F.2d 300 (5th Cir. 1973). Similarly, under Rule 34 on-premises surveys have been ordered which allowed experts to enter and live in a prison and conduct examinations of prison staff and inmates in litigation involving important civil rights. *Morales* v. *Truman*, 59 FRD 157 (E.D. Tx. 1972). In sum, closer examination of the relevant case law and guidelines under the Federal Rules of Civil Procedure will sustain the authority of the District Court in the circumstances of this case in ordering the respondents to make their premises and employees available so that petitioners might administer to the willing employees the desired survey.

CONCLUSION

For the reasons stated above, the petitioned for writs should be denied.

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APPENDIX

Federal Rules of Civil Procedure
Rule 26
DEPOSITIONS AND DISCOVERY

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * * *

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party

seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery by conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Statutes

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) Any alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June

25, 1948, c. 646, 62 Stat. 929; October 31, 1951, c. 655, § 48, 65 Stat. 726; July 1, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.